

Thursday, October 19.

FIRST DIVISION.

[Lord Kyllachy, Ordinary.]

DUMBARTON COUNTY COUNCIL  
EASTERN DISTRICT COMMITTEE  
AND OTHERS v. YOUNG AND  
OTHERS.

*Local Government—Special Water Supply District—Management—Power of Secretary for Scotland—Local Government (Scotland) Act 1889 (52 and 53 Vict. cap. 50), sec. 81, sub-sec. (2).*

By the 2nd sub-section of the 81st section of the Local Government Act 1889 it is provided that where a special water supply district is partly within a county and partly within a burgh or police burgh, it shall be managed and maintained by the sub-committee appointed under the immediately preceding sub-section by the district committee of the county council, and by such number of the town council or police commissioners of such burgh or police burgh, "as failing agreement the Secretary for Scotland may determine, having regard to all the circumstances of the case, . . . and the determination of the Secretary for Scotland may provide for the regulation of the proceedings . . . under this sub-section."

Application having been made to the Secretary for Scotland under this sub-section in the case of a water supply district partly within a county and partly within a police burgh, he determined that the police burgh should be represented on the sub-committee in the proportion of eight police commissioners to six members appointed by the district committee of the County Council.

In an action at the instance of the district committee of the county council, the Court (*aff. judgment of Lord Kyllachy*) reduced the above determination, *holding* that the Secretary for Scotland had only power to determine the number of police commissioners to be added to the sub-committee nominated by the district committee of the county council, and had no power to determine the proportion which the burgh representatives should bear to the members appointed by the county council.

*Observations* by Lord Kyllachy with regard to the power of the Secretary for Scotland to regulate the proceedings of a sub-committee appointed under the above sub-section.

The Special Water Supply District of Duntocher and Dalmuir was formed in 1873. The district lay in the eastern part of the county of Dumbarton, and embraced the whole of the police burgh of Clydebank.

Section 81 of the Local Government (Scotland) Act 1889 provides, *inter alia*, as follows—"With respect to special drainage

districts or special water supply districts the following provisions shall have effect:— (1) Where a special drainage district or special water supply district has been formed in any parish under the Public Health Acts, the district committee may, subject to regulations to be from time to time made with the consent of the county council, appoint a sub-committee for the management and maintenance of the drainage or water supply works, and such sub-committee shall in part consist of persons, whether members of the district committee or not, who are resident within the special drainage district or special water supply district. (2) Where a special drainage district or special water supply district is partly within a county and partly within a burgh or police burgh, the sub-committee appointed under the immediately preceding sub-section, and such number of the town council or police commissioners (as the case may be) of such burgh or police burgh as failing agreement the Secretary for Scotland may determine, having regard to all the circumstances of the case, shall be charged with the management and maintenance of the drainage or water supply works within such special district, and the determination of the Secretary for Scotland may provide for the regulation of the proceedings and for the allocation and payment of the expenses incurred under this sub-section."

On 18th June 1890 the Eastern District Committee of the County Council of Dumbarton appointed a sub-committee in terms of sub-section (1), above quoted, for the management of the Special Water Supply District of Duntocher and Dalmuir.

Thereafter, as the parties failed to agree as to the number of police commissioners to be added to said sub-committee, application was made to the Secretary for Scotland.

On 18th February 1891 the Secretary for Scotland issued the following determination:—"The police burgh of Clydebank shall be represented on the sub-committee charged with the management and maintenance of the water supply works within the Duntocher and Dalmuir Special Water Supply District in the proportion of eight members, being police commissioners appointed by the police burgh, to six members appointed by a district committee of the County Council of Dumbartonshire." In pursuance of this determination a Committee of Management for the special water supply district was appointed, consisting of six members selected by the Eastern District Committee of the County Council and eight of the Police Commissioners of the burgh of Clydebank.

The present action was raised by the Eastern District Committee of the County Council of Dumbarton and certain ratepayers residing in that district against Hugh Young and others, the members of the Special Water Supply District Committee, the Police Commissioners of Clydebank, the Secretary for Scotland, and the County Council, for reduction of the above-mentioned determination by the Secretary for

Scotland, and for declarator, *inter alia*—

“(1) That the Secretary for Scotland has and had no power to make or issue the determination above referred to, and that he has no power to fix or determine the proportion which the members of the body or committee charged under section 81, sub-section 2, of the Local Government (Scotland) Act 1889, with the management and maintenance of the water supply works in said special water supply district, who are police commissioners of said burgh, shall bear to the number of the members of said body or committee who are appointed by the said Eastern District Committee, but that he is only entitled, in virtue of said section 81, sub-section 2, of said Act, failing agreement between the said County Council and the said Commissioners, or between the said Eastern District Committee and the said Commissioners, to fix the number of Commissioners of the said burgh who are to act along with the members of said body or committee (if any) appointed by the said Eastern District Committee, under section 81, sub-section 1, of said Local Government Act, in managing and maintaining the water supply works of the said special water supply district, and to provide for the regulation of the proceedings necessary to fix and determine said number, and for the allocation and payment of the expenses incurred in fixing and determining said number, and that he has no power to regulate the proceedings of the said body or committee charged as aforesaid, or to provide for the allocation or payment of the expenses, if any, which said body or committee charged as aforesaid may incur. . . . (9) That the said body or committee, consisting of the following six persons named by the said Eastern District Committee, viz., . . . and the following eight police commissioners of said burgh, viz., . . . has no power, jurisdiction, or authority as to the management or maintenance of the special water supply works within the said special water supply district, or the levying of assessments from the ratepayers therein, or the disposal of the proceeds of said assessments, or otherwise under any of the Acts foresaid.”

Defences were lodged by Hugh Young and others, the members of the Special Water Supply District Committee, and by the Police Commissioners of Clydebank, and also by the County Council. The last named did not oppose the above conclusions of the summons.

The defenders, the members of the Special Water Supply District Committee, and the Police Commissioners of Clydebank, pleaded, *inter alia*—“(2) The said determination being within the powers conferred on the Secretary for Scotland by the Local Government (Scotland) Act 1889, decree of reduction and declarator should be refused with expenses.

On 18th February 1893 the Lord Ordinary (KYLACHY) pronounced this interlocutor—“The Lord Ordinary having considered the cause, reduces, decerns, and declares in terms of the reductive conclusions of the summons with regard to the first declara-

tory conclusion of the summons: Finds, decerns, and declares that the Secretary for Scotland has and had no power to make or issue the determination recited in the first reductive conclusion, and that he has no power to fix or determine the proportion which the members of the body or committee charged under section 81, sub-section 2, of the Local Government (Scotland) Act 1889 with the management and maintenance of the water supply district, who are police commissioners of the burgh of Clydebank, shall bear to the number of the members of said body or committee who are appointed by the said Eastern District Committee, but that he is only entitled, in virtue of said section 81, sub-section 2 of said Act, failing agreement between the said County Council and the said commissioners, or between the said Eastern District Committee and the said commissioners, to fix the number of commissioners of the said burgh who are to act along with the members of said body or committee (if any), appointed by the said Eastern District Committee, under section 81, sub-section 1 of said Local Government Act, in managing and maintaining the water supply work of the said special water supply district, and decerns: Finds, decerns, and declares in terms of the 9th declaratory conclusion of the summons, and with regard to the remaining declaratory conclusions, supersedes consideration thereof *in hoc statu*.

“*Opinion*.—The leading object of this action is to set aside a certain determination of the Secretary of Scotland, under section 81 of the Local Government Act 1891, as being disconform to and unauthorised by the statute. The determination complained of has reference to the constitution of the sub-committee, charged under section 81 of the Act, with the maintenance and management of the water works within the Duntocher and Dalmuir water supply district—a district formed in 1873 out of the landward parish of Old Kilpatrick in Dumbartonshire, but now comprising within its limits the police burgh of Clydebank, formed in 1886 under the General Police Act of 1862. The complaint is that the Secretary for Scotland, being empowered to fix the number of police commissioners of Clydebank who should sit with the county representatives on the sub-committee, has taken it upon himself to determine that the burgh of Clydebank ‘shall be represented on the sub-committee charged with the management and maintenance of the water supply works within the Duntocher and Dalmuir special water supply district, in the proportion of eight members, being police commissioners appointed by the police burgh, to six members appointed by a district committee of the County Council of Dumbartonshire.’

“It is maintained by the pursuers, who represent the County District Committee, that this is not what the Act authorised. They point out that the total number of police commissioners under the Act of the burgh of Clydebank is twelve, and

that, on the other hand, there is no limit to the number of the representatives whom the County Council Committee, from their side, may place on the sub-committee. Under the Act, therefore, they say the county element was secured in a preponderance. It was so, even if the Secretary for Scotland should determine that the whole twelve of the Clydebank commissioners should be members of the sub-committee. According, however, to the determination, all this has been reversed. The burgh secures the preponderance, and does so by what is in effect a limitation of the number of representatives to be appointed by the County Committee. This, it is said, is entirely unauthorised by the Act. What was intended by the Act was not that the burgh representatives should obtain control of the sub-committee, but that they should be represented upon it; not that the Secretary for Scotland should define the composition of the sub-committee, but that he should fix the number of burgh representatives; not that he should limit the powers of the county sub-committee, but that he should say how many of the twelve police commissioners should sit and vote with the county representatives on the sub-committee.

"I have come, somewhat reluctantly, to the conclusion that there is no good answer to this argument. I think the Secretary for Scotland has probably overlooked the very limited character of his powers; or it may be that he has overlooked the fact that there is a maximum number of police commissioners, and no similar limit on the other side. In any case, it appears to me that he has gone beyond his powers. He might have determined that the whole twelve of the police commissioners might be appointed to the sub-committee, but he was not entitled to determine that whatever number of them were so appointed the County District Committee should appoint a number one-fourth less. In short, he was not in my opinion entitled to interfere with the County District Committee at all; and it is because he has attempted to do so that the present difficulty has occurred.

"I shall therefore so far find for the pursuers, giving decree in terms of the reductive conclusions of the summons, and so much of the declaratory conclusions as properly follow.

"The next object of the action is to have it declared that on the sound construction of section 81 the Secretary for Scotland has no power to regulate the proceedings of the sub-committee constituted under that section, but has merely power to regulate the proceedings connected with the fixing of the number of burgh representatives. I am not prepared to affirm this conclusion. As at present advised, I am disposed to think that the regulations which the Secretary for Scotland is to issue are regulations applicable to the proceedings of the sub-committee. But, on the other hand, I am not prepared to say that under the power to regulate those proceedings is included a power to prescribe functions and define

powers. The definition of those functions and powers, I rather apprehend, must be found in the Act. Accordingly, if I were obliged to deal with this part of the summons, I should be very doubtful whether I could pronounce any judgment practically useful to the parties. As it is, however, it seems to me that the question is altogether too hypothetical to be submitted to a court of law. The Scottish Secretary has, hitherto at least, declined to issue any regulations, and he may never do so. When he does so it will be time enough to consider whether they are open to challenge. In the meantime I think I shall best serve the parties by simply dismissing this part of the declaratory summons." . . .

The defenders, the members of the Special Water Supply District Committee, and the Police Commissioners of Clydebank, reclaimed, and argued—Subsections (1) and (2) of section 81 of the Local Government Act must be read together, and so read, their sense was, that in the event of differences arising, the Secretary for Scotland should have power to settle the respective proportions of burgh or county representation on a special water supply district committee. A contrary construction of these sections would leave it in the power of a district committee of the county council to nominate a sub-committee outnumbering the whole body of police commissioners of a burgh, and thus enable the district committee to secure a preponderance of representation upon the special water district. In many cases this would be unfair, as the burgh was frequently, as in the present case, much the most populous and important part of the special water district.

The pursuers were not called upon.

At advising—

LORD PRESIDENT—I am satisfied that the Lord Ordinary is right.

The question is whether the determination by the Secretary for Scotland is a due exercise of the statutory power conferred upon him by the second sub-section of section 81 of the Local Government Act? That sub-section provides for the constitution of a body for the management and maintenance of drainage and water supply works within a special drainage and water supply district which lies partly within a county and partly within a burgh or police burgh. The procedure contemplated is quite plainly expressed. The initiative rests with the district committee of the county council. They are to nominate their contribution to the committee of management. Then the Secretary for Scotland, with that nomination before him, is to have power, if the parties cannot arrange between themselves, to determine how many should be added from the police burgh to the nucleus so formed. That is a plain proceeding, and what the Secretary for Scotland has done is to elaborate it, and, I think, to make a distinct step outside the power conferred upon him. The Act of Parliament, trusting to the good sense of the bodies having the right of election, has

simply said, that in the event of disagreement, the Secretary for Scotland shall have right to say how many the police burgh may add to the nomination of the county council. Possibly the fertility of controversy may provide emergencies where the provisions of the Act may not completely meet, in all circumstances and in all tempers, the requirements of exaggerated and eccentric cases. But with that we have nothing to do. The provision is that the Secretary for Scotland shall have power to determine that a certain number of gentlemen shall be elected by the police burgh, and not that that number shall be fixed by the fact that the district committee of the county council has nominated a certain number. The determination of the Secretary for Scotland seems to assume that it constitutes a code or rule for the future actings of the county council, whereas the Act contemplates the much simpler case of the Secretary for Scotland having the names of the sub-committee nominated by the county council before him, and determining how many shall be added to it from the burgh.

I have no doubt of the soundness of the Lord Ordinary's decision, and his interlocutor seems appropriate to clear away the difficulties which have been raised.

LORD ADAM, LORD M'LAREN, and LORD KINNEAR concurred.

The Court adhered.

Counsel for the Pursuers—C. S. Dickson—Cook. Agents—Webster, Will, & Ritchie, S.S.C.

Counsel for the Defenders, Hugh Young and Others—D. F. Pearson, Q.C.—J. Macintosh. Agents—Douglas & Miller, W.S.

Counsel for the Defenders, the County Council of Dumbarton—Ure. Agents—C. & A. S. Douglas, W. S.

Friday, October 27.

## SECOND DIVISION.

### BO'NESS REPRESENTATIVES *v.* FULLARTON.

*Church—Lands Conveyed to Trustees for Use and Benefit of Minister—Mineral Rents and Royalties—Income.*

A charter dated in 1676 conveyed certain lands to certain persons as representatives of the inhabitants of Bo'ness "for the use and benefit of the minister of the gospel serving the cure at the kirk of Bo'ness."

In 1888 the minerals in the lands were leased by the said representatives under a lease for twenty years for payment of a fixed rent of £25 or of royalties.

Held that these mineral rents or royalties were not to be handed over to the minister of the parish as ordinary rent or income from the lands, but fell

to be accumulated yearly by the representatives of the town for behoof of the benefice, the interest and annual proceeds of the accumulating fund being paid to the minister.

The town of Bo'ness anciently formed part of the parish of Kinneil, but about the year 1632 the inhabitants of Bo'ness resolved to have it disjoined and erected into a separate parish. In 1638 they built a church in Bo'ness by means of voluntary contributions, and they then proceeded to create a fund for the support of a minister. With the view of establishing a permanent stock for the benefit of the cure, part of the seats in the church were conveyed to certain individuals under the burden of perpetual rents. The bonds taken for these rents were made payable either to the minister and his successors or to certain persons to be elected by the inhabitants as assistants to the minister in the management of the funds for his behoof, and they bore to be granted in order "to make up a stock for the minister and his successors, their stipends." Considerable sums of money were gradually raised for the same purpose, and these were invested for the use, utility, and behoof of the ministers of the said church. The rents of the seats and the income from the funds raised as aforesaid did not, however, amount to 800 merks per annum, which by the Act of the Parliament of Scotland 1633, cap. 8, was the lowest stipend competent to be given to a clergyman of the Church of Scotland, and it became necessary for the inhabitants of Bo'ness, in order to obtain the erection of their town into a separate parish, to provide by annual stent or assessment such a sum as should make up a yearly stipend of 800 merks. Application was accordingly made to Parliament for an Act to authorise the erection of Bo'ness as a parish, and the raising of the necessary assessments, and on 8th March 1649 such an Act was passed erecting the parish of Bo'ness in terms of the application, and giving "power to those whom the supplicants have chosen to be assisting to the kirk-session according to the Act of Parliament, or some other who shall be nominate be common consent of town and session to stent yearly every inhabitant and indweller within the said parochin, bounded as said is, according to their abilities for making up the yearly stipend of 800 merks, promised and obliged to be paid by the supplicants to the minister and his successors in the said charge, and that according to their abilities, ay, and while the annual rents of the supplicants, their stock, extend to the sum of 800 merks yearly." After the passing of this Act additions were made from time to time to the permanent fund for behoof of the minister of the parish.

In 1648 a sum of 5000 merks, part of the fund raised as aforesaid for behoof of the minister of Bo'ness, was lent out on wadset over the lands of Muirhouse, which extended to 171 imperial acres, and in 1653 the lands of Muirhouse were appraised for the said debt. In 1676 a charter was applied for and obtained from King